BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES BANKS, JR.	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 255,009
MAGNA CORPORATION and	)	& 255,417
TOPEKA METAL SPECIALITIES	)	
Respondents	)	
AND	)	
	)	
SAFECO INSURANCE COMPANY and	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent Magna Corporation (Magna) appeals the Award of Administrative Law Judge Bryce D. Benedict dated December 7, 2001, wherein claimant was awarded a permanent partial disability of 67.4 percent.

Respondent Magna alleges the Administrative Law Judge erred in applying the work disability to claimant's injuries suffered on January 12, 2000. Magna contends that claimant's disability resulted from a November 9, 1998 accident which led to claimant's surgery and the January 12, 2000 incident was merely a temporary aggravation of that original injury. The Appeals Board (Board) held oral argument on June 18, 2002.

APPEARANCES

Claimant appeared by his attorney, Patrick R. Nichols of Lawrence, Kansas. Respondent Magna and its insurance carrier Safeco Insurance Company appeared by their attorney, Gregory D. Worth of Roeland Park, Kansas. Respondent Topeka Metal Specialities (Topeka Metal) and its insurance carrier Travelers Insurance Company appeared by their attorney, John F. Carpinelli of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. The parties did agree at oral argument that the

Award of the Administrative Law Judge had the docket numbers reversed. The 10 percent impairment against Topeka Metal and its insurance carrier under Docket No. 255,009, should have been under Docket No. 255,417. Likewise, the work disability award assessed against Magna under Docket No. 255,417, should have been under Docket No. 255,009.

Additionally, the parties acknowledged that the method of computing the Award utilized by the Administrative Law Judge, while being different than that utilized by the Board in its past cases, was not in dispute at this time. Therefore, should the Award be affirmed, the computation method of the Administrative Law Judge will, likewise, be affirmed. However, should the Award be modified, the parties agreed the Board will compute any modification of this Award utilizing the formula normally used by the Board.

ISSUES

Docket No. 255,417

(1) What is the nature and extent of claimant's injury and/or disability from the accident of November 9, 1998?

Docket No. 255,009

(1) Did claimant suffer accidental injury on January 12, 2000?

(2) Did claimant's accidental injury arise out of and in the course of his employment with respondent?

(3) What is the nature and extent of that accidental injury?

(4) Is respondent entitled to a credit against claimant's disability award as a result of the preexisting functional impairment stemming from the November 9, 1998 accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury on November 9, 1998, when, while lifting a 70-pound front plate, he suffered injury to his low back. Claimant was referred by respondent for conservative treatment with board certified orthopedic surgeon Michael L. Smith, M.D. The conservative treatment did not improve claimant's condition, and he

underwent surgery with Dr. Smith on May 3, 1999. The surgery involved a discectomy at L4-5 without fusion. Claimant was returned to work, light duty, with specific temporary restrictions on July 13, 1999. The initial restrictions included no lifting of over 20 pounds. On August 24, 1999, claimant was returned to regular duty and his restrictions were removed. By October 12, 1999, claimant was at maximum medical improvement according to Dr. Smith.

Claimant returned to work with respondent as a forklift driver, working 40 hours a week plus a substantial amount of overtime in both November and December 1999. He did not limit any of his physical activities during this time.

On November 23, 1999, claimant was referred to Phillip L. Baker, M.D., a board certified orthopedic surgeon, for an impairment rating. After evaluating claimant, Dr. Baker assessed claimant a 10 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Baker placed no restrictions on claimant's ability to perform work at that time.

On January 12, 2000, while driving a forklift, claimant drove through a rough doorway thirty to forty times. Claimant stated that the doorway floor had a 2- to 3-inch variation in the level of the floor. This caused the forklift to jar claimant every time he drove through the doorway. Claimant testified that by the end of the day, he was in pain. He went home that night, but the pain did not improve. On January 13, 2000, claimant returned to his job, but the pain continued to get worse. Before the day was concluded, he reported to Jim McDonald and Mary Daniels, his supervisors, that he was having difficulty performing his work duties. He was referred by Ms. Daniels to Minor Med. The doctor at Minor Med took him off work and provided him pain medication and muscle relaxants. Claimant later returned to work and attempted to perform his duties, but the pain was too great. He was then authorized by Ms. Daniels to return to Dr. Smith, who saw him on January 26, 2000.

When Dr. Smith examined claimant in January of 2000, claimant was experiencing back spasms, numbness in his left leg and both feet, and significant pain. Dr. Smith tentatively diagnosed lumbosacral strain and was concerned that claimant may have suffered a recurrent herniated disc. An MRI performed on claimant on June 13, 2000, indicated significant degenerative disc disease, but did not reveal a herniated disc. Claimant underwent epidural steroid injections and physical therapy, and was referred for an FCE and pain management with Dr. E. Bickelhaupt.

Claimant was returned to work on September 27, 2000, but was restricted from lifting over 50 pounds. By October 13, 2000, a TENS unit was ordered for claimant and his lifting restriction had been reduced to 35 pounds. Dr. Smith ultimately released claimant after last seeing him on January 16, 2001, with restrictions that he lift no more than 75 pounds on a regular basis. Dr. Smith utilized the FCE performed by Kathy

Blankenship in determining the activities claimant was capable of performing upon his return to work.

Claimant was examined a second time by Dr. Baker on September 18, 2001, again for the purpose of providing a functional impairment rating. Dr. Baker opined that claimant's 10 percent impairment originally assessed in 1999, had not increased as a result of the activities of January 12, 2000. Dr. Baker did, however, state that restrictions would have been appropriate from the 1998 accident, acknowledging his opinion was hindsight. He opined that the restrictions placed upon claimant after the January 12 accident were the same restrictions which should have been placed upon him after the 1998 accident.

Claimant was referred for vocational assessments to vocational experts Karen Crist Terrill and Michael Dreiling. Mr. Dreiling formulated a task list opinion, finding claimant to have performed eighteen tasks during the 15 years preceding his accident. This task list opinion of Mr. Dreiling was presented to Dr. Smith who testified that claimant had lost the ability to perform sixteen of the eighteen tasks, for an 89 percent task loss.

Ms. Terrill created a task list including forty-seven tasks. Dr. Baker, after reviewing that task list, felt claimant could no longer perform eighteen of the forty-seven tasks, for a 38 percent task loss. Dr. Baker, however, stated that, in his opinion, claimant's task loss all stems from the 1998 accident, rather than from the injuries alleged on January 12, 2000.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an evaluation on June 5, 2001. Dr. Prostic agreed with Dr. Baker's assessment of claimant's impairment from the 1998 accident, finding claimant had suffered a 10 percent impairment to the body as a whole from that injury. However, he felt claimant's condition, after the January 12, 2000 incident, had worsened and assessed claimant an additional 10 percent functional impairment to the body as a whole. Dr. Prostic stated that claimant should have been restricted after the 1998 accident, but also felt claimant's condition had worsened as a result of the January 12, 2000 accident.

Dr. Prostic was also shown the task list from Mr. Dreiling. He originally testified that claimant was incapable of performing fourteen of the eighteen tasks identified in that list. However, on cross-examination, Dr. Prostic questioned claimant's ability to perform tasks 3, 12 and 14. He was concerned that undue vibration or significant vibration would cause claimant additional problems. Claimant, when testifying about tasks 3, 12 and 14, discussed the significant vibrations contained in task 12. He, however, did not identify tasks 3 or 14 as involving significant vibration. The Board, therefore, finds that Dr. Prostic's testimony eliminated fifteen of the eighteen tasks, resulting in an 83 percent loss of tasks.

The doctors all acknowledged that claimant had degenerative disc disease in his low back, which predated his work injuries. However, Dr. Prostic and Dr. Smith felt that the

work activities performed by claimant and the injuries suffered there aggravated claimant's preexisting condition. Both Dr. Prostic and Dr. Smith stated that the accident of January 12, 2000, had worsened claimant's condition. But Dr. Baker felt that claimant's loss of ability to perform tasks resulted from the degenerative disc disease which preexisted claimant's injuries. He acknowledged claimant suffered injuries in 1998, but testified that the January 2000 incident was only a temporary aggravation of claimant's preexisting conditions.

Claimant was ultimately terminated from respondent on April 19, 2001. He began searching for alternate employment and obtained a job with C & M Quarries on July 30, 2001, earning a weekly wage of $378. Claimant continued working for C & M Quarries until October 2001, when one of his paychecks bounced due to insufficient funds. Claimant then obtained employment on October 16, 2001, with American Kan Build, earning a weekly wage of $350 without benefits.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[2]

Claimant suffered two accidents while working for respondent. The first accident occurred on November 9, 1998. The Board is persuaded by the opinions of Dr. Baker and Dr. Prostic that claimant suffered a 10 percent whole body impairment stemming from the accident on November 9, 1998.

It is alleged by Magna that the restrictions placed upon claimant should have applied to claimant's 1998 accidental injury. However, the reality of the situation is that claimant was returned to work by both Dr. Smith and respondent's evaluator, Dr. Baker, without restrictions. Claimant continued performing his regular work duties from August 24, 1999, until he suffered an additional injury on January 12, 2000. While there is medical evidence from Dr. Baker that the January 12, 2000 incident resulted in no additional impairment to claimant and was but a temporary aggravation of his preexisting condition, the more persuasive medical evidence from both Dr. Smith and Dr. Prostic is that this January 12 incident did permanently worsen claimant's condition.

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[1] *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

[2] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dr. Prostic assessed claimant an additional 10 percent functional impairment from that injury. Dr. Smith found claimant to be suffering additional symptoms, including back spasms and numbness in his leg and both feet. Dr. Smith found, after the January incident, claimant was in need of significant work restrictions in order to prevent additional injury and further degeneration of his degenerative disc disease.

Respondent Magna argues that the rationale in *Surls*[3] should apply here. The Board disagrees. The question presented in *Surls* was whether the claimant's old or new employer was responsible for the work disability suffered by claimant. In *Surls*, the only doctor who testified, Dr. Prostic, found that the claimant's work restrictions did not change after the second accident. While Dr. Prostic assessed the claimant an additional 5 percent functional impairment as a result of the second accident, he maintained the work restrictions from the original accident still applied. The Court of Appeals found that while the intervening accident increased Surls' functional disability, it did not increase his work disability and applied the work disability to the first accident date.

Here, the circumstances are different. Claimant was returned to work after the 1998 accident without restriction and, for several months, performed his regular job duties without apparent difficulty. After the January 2000 accidental injury, claimant experienced additional symptoms, was placed under additional restrictions and his ability to perform his job was significantly limited. The Board finds that any work disability to which claimant would be entitled stems from the January 12, 2000 accident and not from the earlier, 1998 accidental injury.

K.S.A. 1999 Supp. 44-510e(a) defines permanent partial general disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

That statute, however, must be read in light of *Foulk*[4] and *Copeland*.[5] In *F*oulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1999 Supp. 44-510e by refusing to attempt to perform an

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[3] *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

accommodated job which had been offered and which paid a comparable wage. Here, respondent was unable to accommodate the restrictions placed upon claimant, and claimant was terminated as of April 19, 2001. Therefore, the policies contained in *Foulk* do not apply.

The Court of Appeals in *Copeland* required that a worker's post-injury wage would be based upon his or her ability rather than actual wages if a worker fails to make a good faith effort to find appropriate employment after recovering from the injury. In this instance, claimant lost his job on April 19, 2001. Claimant, at the regular hearing, provided a list of places where he applied for employment after leaving respondent. Claimant was ultimately successful in obtaining employment at C & M Quarries on July 30, 2001. In reviewing the job search list created by claimant, which is marked as Claimant's Exhibit 18 to the regular hearing, the Board finds that claimant put forth a good faith effort in his attempts at reemployment after his termination. The Board, therefore, finds that the limitations set forth in *Copeland* do not apply and claimant's permanent partial general disability benefits will be computed based upon the actual wages being earned by claimant subsequent to his termination of employment.

For the period from April 20, 2001, through July 29, 2001, when claimant was looking for employment, claimant suffers a 100 percent loss of wages. Beginning July 30, 2001, and continuing through October 15, 2001, while claimant was working for C & M Quarries, the average weekly wage of $378 being earned by claimant computes to a wage loss of 48 percent when compared to claimant's average weekly wage of $722.24.

Beginning October 16, 2001, when claimant changed his job to that with American Kan Build, claimant was earning $350 a week. This represents a 51.5 percent loss of wages.

K.S.A. 1999 Supp. 44-510e obligates that the task loss suffered by claimant be provided in the opinion of the physician. The opinions of Dr. Prostic, Dr. Baker and Dr. Smith are all contained in the record. Claimant argues that the opinion of Dr. Smith should be rejected as it is based upon a task list created by Karen Terrill. The Administrative Law Judge in the Award agreed, finding that Ms. Terrill's task loss opinion and her methodology for creating that opinion was not in "great favor" with the court. Apparently, the Administrative Law Judge found that Ms. Terrill's habit of producing a task list generally favored respondents by breaking the task duties down into unusually large numbers of tasks. The Administrative Law Judge described those tasks as being insignificant or performed only for a few minutes a day or both. However, the Board in considering the task list of Ms. Terrill and Mr. Dreiling, finds neither is sufficiently accurate to allow for or justify the rejection of the other. It is acknowledged that the task lists of Mr. Dreiling and Ms. Terrill are significantly different in the numbers of tasks created. However, in reviewing the actual activities performed by claimant, the Board finds the two

task lists are fairly similar. The distinction between the two is that Mr. Dreiling tends to create task descriptions which are more akin to job descriptions. For example, when both Mr. Dreiling and Ms. Terrill considered claimant's work with Rinner Construction as a concrete laborer, Mr. Dreiling lists as a single task, tearing out existing concrete. Ms. Terrill breaks that particular activity down into several tasks, including operating jackhammers, using sledgehammers and removing concrete pieces. The Board does not find Ms. Terrill's method of breaking jobs down into more specific tasks to violate the spirit of K.S.A. 1999 Supp. 44-510e. The Board acknowledges that while Ms. Terrill tends to break jobs down into more minute activities than Mr. Dreiling, it cannot be said that either method of describing tasks violates the legislative intent in K.S.A. 1999 Supp. 44-510e. Therefore, the Board in considering claimant's loss of tasks, will utilize the opinions of Dr. Smith, Dr. Prostic and Dr. Baker. The opinions have generated a high task loss of 89 percent and a low task loss of 38 percent. The Board in considering all of the task loss opinions, finds claimant has suffered a task loss of 63.5 percent.

During the period April 20, 2001, through July 29, 2001, when claimant was unemployed, claimant suffered a 100 percent wage loss. When averaged with claimant's 63.5 percent task loss, this results in an 81.75 percent permanent partial general disability.

Beginning July 30, 2001, and continuing through October 15, 2001, claimant earned a weekly wage of $378. This resulted in a 48 percent wage loss which, when averaged with the task loss of 63.5 percent, results in a 55.75 percent permanent partial general disability. Beginning October 16, 2001, while employed with American Kan Build at $350 per week, claimant suffered a 51.5 percent wage loss. This, when averaged with the 63.5 percent task loss, resulted in a permanent partial general disability of 57.5 percent.

K.S.A. 1999 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

Based upon the opinions of Dr. Prostic and Dr. Baker, and pursuant to K.S.A. 1999 Supp. 44-501(c), the Board finds impairment of 10 percent which will be deducted from claimant's permanent partial general disability, resulting in a permanent partial general disability award for the injury of January 12, 2000, of 47.5 percent to the body as a whole.

The Board, therefore, finds that the Award of the Administrative Law Judge in Docket No. 255,417, assessing claimant a 10 percent permanent partial general disability against Topeka Metal and its insurance carrier, Travelers Insurance Company, should be and is hereby affirmed. The Award against respondent Magna and its insurance carrier

in Docket No. 255,009 should be and is hereby modified to award claimant a 47.5 percent permanent partial general disability based upon an average weekly wage of $722.24.

AWARD

Docket No. 255,417

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the December 7, 2001 Award of Administrative Law Judge Bryce D. Benedict is affirmed and that an award is granted in favor of the claimant, James Banks, Jr., and against the respondent, Topeka Metal Specialties, and its insurance carrier, Travelers Insurance Company, for an injury occurring on November 9, 1998, for a 10 percent permanent partial general disability.

Claimant is entitled to 20 weeks temporary total disability compensation at the rate of $366 per week totaling $7,320, followed by 41 weeks permanent partial general disability at the rate of $366 per week totaling $15,006 for a 10 percent permanent partial general body disability, making a total award of $22,326.

As of the date of this award, all amounts are due and owing and ordered paid in one lump sum minus any amounts previously paid.

Docket No. 255,009

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the December 7, 2001 Award of Administrative Law Judge Bryce D. Benedict is modified and an award is granted in favor of the claimant, James Banks, Jr., and against the respondent, Magna Corporation, and its insurance carrier, Safeco Insurance Company, for an additional 10 percent permanent partial general disability, followed by an 81.75 percent permanent partial general disability, followed by a 55.75 percent permanent partial general disability, followed by a 47.5 percent permanent partial general disability for the injuries suffered on January 12, 2000.

Claimant is entitled to 59 weeks temporary total disability compensation at the rate of $383 per week totaling $22,597, followed by 7.14 weeks permanent partial general disability at the rate of $383 per week through April 19, 2001 totaling $2,734.62 for a 10 percent permanent partial general disability, followed by 14.43 weeks permanent partial general disability at the rate of $383 per week representing the period from April 20, 2001, through July 29, 2001, when claimant was unemployed, totaling $5,526.69 for an 81.75 percent permanent partial general disability. Thereafter, for the period July 30, 2001 through October 15, 2001, claimant is entitled to 11.14 weeks of permanent partial general

disability at the rate of $383 per week totaling $4,266.62 for a 55.75 percent permanent partial general disability. Thereafter, beginning October 16, 2001, claimant is entitled to 143.52 weeks of permanent partial disability at the rate of $383 per week totaling $54,968.16 for a 47.5 percent permanent partial general disability, for a total award of $90,093.09.

As of October 9, 2002, claimant is entitled to 59 weeks temporary total disability compensation at the rate of $383 per week totaling $22,597, followed by 84 weeks permanent partial disability compensation at the rate of $383 per week totaling $32,172, for a total due and owing of $54,769. Thereafter, claimant is entitled to 92.23 weeks permanent partial disability at the rate of $383 per week totaling $35,324.09 until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick R. Nichols, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent (Topeka Metal)
Gregory D. Worth, Attorney for Respondent (Magna)
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation